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UNITED STATES OF AMERICA

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

\$451,624.51 SEIZED FROM FXDD
ACCOUNT NO. '7807 AND
\$106,300.29 SEIZED FROM FXDD
ACCOUNT NO. '7870,

Defendants.

No. SACV 14-00051-JLS (DFMx)

**OPPOSITION TO MOTION FOR
ATTORNEY FEES; MEMORANDUM OF
POINTS AND AUTHORITIES**

DATE: July 10, 2015
TIME: 2:30 p.m.
CTRM: 10A

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1 **I. INTRODUCTION**

2 Plaintiff United States of America (the "government") does not
3 object to the calculation of rates and hours submitted by the
4 Cornerstone Claimants in support of their motion for attorney's fees
5 pursuant to 28 U.S.C. Section 2465. The government respectfully
6 suggests, however, that this Court should deny the motion for
7 attorneys' fees because:

- 8 - It is inequitable to apply literally the provisions of Section
9 2465 where, as here, it is undisputed that the two groups of
10 competing claimants are both victims of a fraud committed by a
11 non-claimant and the government's goal--after seizing the
12 defendant funds for the benefit of the victims--has been to
13 return the seized funds to the victims in an equitable manner;
14 and
15 - The government's actions in seizing and seeking to return the
16 seized funds to the victims of the fraud in an equitable matter
17 constitutes substantial compliance with the provisions of
18 Section 2465 governing claims asserted by competing claimants.

19 **II. FACTUAL AND PROCEDURAL BACKGROUND**

20 In July 17, 2013, a grand jury in this District indicted Lynn
21 Bogart on three counts of mail fraud and one count of wire fraud.
22 United States v. Bogart, No. SA CR 13-0122. Dkt. 1 at 4. On August
23 14, 2013, Bogart was arrested by FBI agents in this District. At
24 the time of his arrest, Bogart told the agents that a
25 group of individuals had invested approximately \$520,000 with him
26 under the name of Cornerstone Equity Fund (the "Cornerstone
27 Investors" or "Cornerstone Claimants"). Bogart stated that the
28 invested funds were on deposit in accounts at FXDirectDealer, LLC

1 ("FXDD"). Dkt. 1 at 4. On August 16, 2013, the government seized
2 \$451,624.51 from FXDD Account No. '7807 and \$106,300.29 from FXDD
3 Account No. '7870 pursuant to a federal seizure warrant. On January
4 13, 2014, the government filed a civil forfeiture complaint against
5 the funds seized on August 16 (the "defendant funds"). Dkt. 1. The
6 complaint alleged that (A) Bogart had told the FBI that the funds in
7 the FXDD accounts (that were subsequently seized) had been obtained
8 from Cornerstone; and (B) in 2008 Bogart fraudulently obtained over
9 \$1 million from a group of individual investors not associated with
10 Cornerstone (the "Non-Cornerstone Investors" or "Non-Cornerstone
11 Claimants"). Dkt. 1 at 3-4. The complaint alleged that the defendant
12 funds were subject to forfeiture as the proceeds of wire fraud and
13 mail fraud. Dkt. 1 at 5. Pursuant to stipulation, discovery in the
14 case was stayed until late 2014 due the pending criminal case
15 against Bogart.

16 Both the Cornerstone Investors and the Non-Cornerstone
17 Investors filed claims and answers. Dkt. 9-13, 15-17, 30-34, 75-77
18 (claims and amended claims); 18, 19, 22-24, 40-44 (answers). Bogart
19 failed to file a claim or answer. The government has consistently
20 stated that its goal in this action was to return the money to the
21 victims of Bogart's fraud once the relative entitlements of the
22 competing claimants were established.

23 On January 7, 2015, the Cornerstone claimants filed a motion
24 for summary judgment. Dkt. 65. In their motion, the Cornerstone
25 claimants asserted that they were innocent owners of the defendant
26 funds pursuant to 18 U.S.C. Section 983(d), that only the funds of
27 the Cornerstone Claimants were deposited in the FXDD accounts from
28 which the defendant funds were seized, and that the defendant funds

were subject to a constructive trust and not subject to forfeiture.
Dkt. 65-1 at 11-16.

On February 6, 2015, the Non-Cornerstone Claimants filed their opposition to the summary judgment motion. Dkt. 66. In their opposition, the Non-Cornerstone Claimants asserted that a constructive trust cannot be imposed where there are claims from multiple victims similarly situated; and that no constructive trust existed because the Cornerstone funds had been commingled with funds that Bogart had received from the Non-Cornerstone Claimants. Dkt. 66 at 6-12. The Non-Cornerstone Claimants also requested time to conduct additional discovery pursuant to Rule 56(d) of the Federal Rules of Civil Procedure. Dkt. 66 at 17.

On February 18, 2015, this Court continued the hearing on the summary judgment motion to May 8, 2015, in order to give the Non-Cornerstone Claimants additional time to conduct discovery "regarding the funds transferred to and from the relevant accounts in this action." Dkt. 79 at 2. The Court ordered the Non-Cornerstone Claimants to supplement their opposition to the summary judgment motion by April 17, 2015. Id.

On May 5, 2015, this Court issued an order granting the motion for summary judgment in favor of the Cornerstone Claimants on their constructive trust theory. Dkt. 89. This Court did not specifically address the issue whether the Cornerstone Claimants and the Non-Cornerstone Claimants were similarly situated. Judgment was entered on May 12, 2015. Dkt. 94.

III. THIS COURT SHOULD DENY THE CORNERSTONE CLAIMANTS' REQUEST FOR ATTORNEY'S FEES.

As the Cornerstone Claimants point out, 28 U.S.C. Section 2465 provides for an award of attorney's fees to a claimant who

1 "substantially prevails" in a civil forfeiture action. Congress
2 enacted Section 2465 as part of the Civil Asset Forfeiture Reform
3 Act ("CAFRA") in order to allow innocent owners to "make themselves
4 whole" after "wrongful government seizures." United States v. One
5 Lincoln Navigator, 328 F.3d 1011, 1012 (8th Cir. 2003). The
6 purposes of CAFRA are not served by an award of attorney's fees in
7 this case, where the government acted properly in seizing from
8 Bogart what are indisputably proceeds of fraud and then sought to
9 return the funds to all of the victims of the fraud.¹ In fact,
10 Congress sought to insulate the government from liability for
11 attorney's fees in cases involving multiple claimants where one or
12 more claimants prevailed over the others. Specifically, Section
2465 provides that:

13 If there are multiple claims to the same property, the United
14 States shall not be liable for costs and attorneys fees
15 associated with any such claim if the United States—

16 (i) promptly recognizes such claim;

17 (ii) promptly returns the interest of the claimant in
18 the property to the claimant, if the property can be
19 divided without difficulty and there are no competing
20 claims to that portion of the property;

21 (iii) does not cause the claimant to incur
22 additional, reasonable costs or fees; and

23 (iv) prevails in obtaining forfeiture with respect to
24 one or more of the other claims.

26 ¹ Cornerstone does not, and cannot, assert that it is the
27 victim of a "wrongful government seizure" since if the government
28 had not seized the defendant funds Bogart in all likelihood would
have dissipated them by now, leaving Cornerstone with nothing.

1 28 U.S.C. § 2465(b) (2) (C) (emphasis added). As explained more
2 fully below, the conditions that Congress established in
3 Section 2465(b) (2) (C) (i-iv) were intended to apply to cases
4 involving competing claims asserted by innocent and non-
5 innocent claimants. An example of such a case is United States
6 v. Khan, 497 F.3d 204 (2d Cir. 2007), which involved "three
7 convicted claimants and those who had contributed money to one
8 of them" Id. at 207. Where, as here, the only
9 claimants are innocent and the potential non-innocent claimant
10 has not asserted a claim (or has explicitly abandoned his claim
11 and admitted that the facts establishing the forfeitability of
12 the defendant funds), the conditions set forth in Section
13 2465(b) (2) (C) are, as a practical matter, impossible for the
14 government to meet, since at the early stages of the litigation
15 the government does not have enough information to identify
16 which group of claimants deserves to recover.² Specifically,
17 the government was not and is not in a position to "recognize"
18 the claim of the Cornerstone Claimants (as provided in Section
19 2465(b) (2) (C) (i)) without rejecting the claims of the Non-
20 Cornerstone Claimants, who presented evidence that they were
21 "similarly situated" to the Cornerstone Claimants.³ Recognizing

22 ² It was for this reason that the government requested a two-
23 week continuation of the hearing on Cornerstone's summary judgment
24 motion. Dkt. 67.

25 ³ In C.F.T.C. v. Walsh, 712 F.3d 735 (2d Cir. 2013), the Second
26 Circuit held that competing claimants were similarly situated where

- 27 - they had the "same [investment] goal[s]";
- 28 - they were "solicited as investors by the same defendants";
- they were "treated economically the same in the defendants' . .
. account statements"; [Continued on next page]

1 the constructive trust claim asserted by the Cornerstone
2 Claimants under such circumstances would have been inconsistent
3 with the rule that it is inequitable to impose a constructive
4 trust over the proceeds of fraud in favor of one claimant (as
5 opposed to pro-rata distribution of the proceeds among all
6 claimants). United States v. Real Property Located at 13328
7 and 13324 State Highway 75, 89 F.3d 551, 553 (9th Cir. 1996);
8 accord S.E.C. v. Capital Consultants, Inc., 397 F.3d 733, 747
9 (9th Cir. 2005).⁴ For the same reasons, the government was not
10 and is not in a position to "obtain[] forfeiture" (Section
11 2465(b)(2)(C)(iv)) with respect to the Non-Cornerstone
12 claimants.⁵

13 The facts set forth above demonstrate that the literal
14 application of Section 2465 under the circumstances here will lead
15 to the government being required to pay for the attorney fees of a

16 [Continued from previous page]

- 17 - assets were commingled;
18 - the fraud scheme was "ongoing"; and
19 - the commingled assets could not be unraveled reliably.

20 Id. at 754. Not all of these factors were considered by the Court
21 here.

22 ⁴ In Khan, by contrast, the government was able to obtain
23 forfeiture of a portion of the money claimed by the criminal
24 claimants. 497 F.3d at 207-08. With respect to the innocent
25 claimants, the court held that the government acted with "reasonable
26 dispatch" in returning the seized funds to them, and noted that a
premature return of funds to one group of innocent claimants would
have meant that the government would have "lack[ed] sufficient funds
to pay the remaining [innocent] claimants." Id. at 211.

27 ⁵ The government attempted to obtain forfeiture of Bogart's
28 potential interest in the defendant funds (Dkt. 52 & 59), but the
Court declined to find that his interest was forfeitable. Dkt. 37 &
57.

1 victim who would have recovered no money at all had the government
2 not acted to seize the funds to which that victim has asserted a
3 claim. Moreover, it requires the government to fund the efforts of
4 a group of victims that received the entirety of the defendant funds
5 while leaving the remaining victims--who are no less deserving--with
6 no recovery and with responsibility for their own fees. The
7 government respectfully suggests that Congress did not intend for
8 such a result to occur when it enacted Section 2465(b)(2)(C), and
9 this Court should not interpret the statute in a way that will lead
10 to such a result. See generally United States v. Nguyen, 73 F.3d
11 887, 893 (9th Cir. 1995) (in interpreting a statute, "absurd results
12 are to be avoided.") (citation omitted). This is particularly true
13 where the government has at all times stated that its goal is to
14 make the victims whole in an equitable manner, which is the same
15 goal Congress had in mind when it enacted the attorney fee
16 provisions of CAFRA in the first place. See Lincoln Navigator,
17 supra, 328 F.3d 1012. Because the underlying purpose of Section
18 2465(b)(2)(C) has been satisfied, the Court should find that the
19 government's actions here constitute substantial compliance with the
20 statute and on that basis should deny Cornerstone's motion for
21 attorneys' fees.⁶ See generally Newell v. Ruiz, 286 F.3d 166, 171
22 (3d Cir. 2002) ("substantial compliance" doctrine applies where
23 underlying purpose of statute has been satisfied).

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27
28 ⁶ Cornerstone failed to address Section 2465(b)(2)(C) despite
its obvious relevance here.

1 **IV. CONCLUSION**

2 For the foregoing reasons, the government respectfully requests
3 that this Court deny the Motion of the Cornerstone Claimants for
4 attorney's fees.

5 Dated: June 12, 2015

Respectfully submitted,

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